Supreme Court, U.S.
FILED

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In the

Supreme Court of the United States

WILLIAM K. AVERY,

Petitioner,

v.

SUPERIOR BANK, FSB,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Marina Tramontozzi
c/o Curry & Taylor
1330 New Hampshire Ave
Suite 124
Washington, DC 20036
(202) 393-4141

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦USSCINFO.COM

24 pp

QUESTIONS PRESENTED

I. WHETHER THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AND THE UNITED STATES COURT OF APPEALS FOURTH CIRCUIT ERRED IN ALLOWING A JUDGMENT AS A MATTER OF LAW IN DISMISSING THE PETITIONER'S COMPLAINT RESULTING IN A VIOLATION OF THE PETITIONER'S RIGHT OF A JURY TRIAL AND HIS DUE PROCESS RIGHTS UNDER THE UNITED STATES CONSTITUTION AFTER THE PETITIONER SUBMITTED PRIMA FACIE EVIDENCE THAT SUPERIOR BANK VIOLATED THE EQUAL CREDIT OPPORTUNITY ACT AND CONDUCTED UNFAIR PRACTICES?

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OPINIONS BELOW

The decision of the United States Court of Appeals Fourth Circuit dated December 30, 2002 affirming the District Court's Decision entering judgment as a matter of law in favor of the Respondent is set forth in the Appendix, p. 1a. The Order of the United States District Court-for the District of Maryland is set forth in the Appendix, p.2a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals Fourth Circuit affirmed the United States District Court for the District of Maryland's decision granting the Respondents' Judgment as a matter of law and denied the petition for rehearing on February 25, 2003. This Petition was timely filed within the prescribed period.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

CONSTITUTIONAL PROVISIONS

Seventh Amendment, United States Constitution:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and not fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

Fourteenth Amendment, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

STATUTORY PROVISIONS:

Equal Credit Opportunity Act, 15 U.S.C. Section 1691 (2003).

Scope of Prohibition.

(a) Activities constituting discrimination. It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction –

(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);

(2) because all or part of the applicant's income derives from any public assistance program; or

(3) because the applicant has in good faith exercised any right under the Consumer Credit Protection Act...

STATEMENT OF THE CASE

In 1999, the Petitioner, Dr. William Avery, an African-American, applied to Superior Bank, FSB, the Respondent, to lower his mortgage interest rate and pay off personal debt; he was already a customer of the Respondent at the time of his application for over a two year period and never missed a payment.1 On three occasions, the Respondent denied the Petitioner's application based upon his credit; the Respondent failed to commit to a lower interest rate on the Petitioner's mortgage after he met all of the credit requirements. The Respondent had access to the evidence that the credit report was inaccurate and that he was an African-American. After threatening a lawsuit, the Respondent offered a pre-approval commitment letter that had a higher interest rate than his then rate and had twenty-one conditions.

The Petitioner filed a civil action against the Respondent2 in the United States District Court for the District of Maryland on December 29, 2000. The Petitioner alleged that the Respondent discriminated against him during the mortgage process and conducted

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1 In 1997, the Petitioner sought a twenty year mortgage from City Federal Funding and Mortgage Corp. At that time, the Petitioner's credit report showed several troubling entries including unpaid child support obligations and unpaid student loans. City Federal, however, was supplied information showing that the entries were incorrect and that he had almost a perfect payment history. As a result of this evidence, City Federal extended a twenty year mortgage to the Petitioner and told the Petitioner that after two years he could refinance. City Federal sold the loan to Superior Bank, FSB.

2 The Federal Deposit Insurance Corporation was appointed as receiver of Superior Bank and substituted in as the Defendant in the case.

Credit Opportunity Act (15 USC Section 1691 (2000) and state statutes. On February 23, 2001, the Respondent filed an Answer denying the allegations.

The Respondent never complied with any discovery requests nor did it conduct any deposition. On the other hand, the Petitioner had provided the Respondent with evidence to support his allegations. On July 9, 2002, a jury trial commenced. During the opening statement and on cross-examination, the Respondent's attorney made false accusations regarding the Petitioner's credit and badgered his character.3 At the conclusion of the Petitioner's case-in-chief, the Respondent made a motion in open court for Judgment as a Matter of Law. Judge Alexander William Jr. granted the Respondent's motion.

As a result, on August 7, 2002, the Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Fourth Circuit. On December 30, 2002, the Appeals Court affirmed the District Court's order. The Petitioner filed a Petition for Rehearing on January 9, 2003 which was also denied.

Therefore, the Petitioner files this Writ of Certiorari requesting that this Honorable Court grant writ and review the merits of the case given that the Petitioner's constitutional rights have been violated.

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3 The Respondent stated that the Petitioner owed $115,000.00 in child support, and thus, he was an "irresponsible Afro-American man" and thus deserved a high interest rate on a mortgage. However, the Petitioner submitted evidence that there was no child support owed.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AND THE UNITED STATES COURT OF APPEALS FOURTH CIRCUIT ERRED IN ALLOWING A JUDGMENT AS A MATTER OF LAW IN DISMISSING THE PETITIONER'S COMPLAINT RESULTING IN A VIOLATION OF THE PETITIONER'S RIGHT OF A JURY TRIAL AND HIS DUE PROCESS RIGHTS UNDER THE UNITED STATES CONSTITUTION AFTER THE PETITIONER SUBMITTED PRIMA FACIE EVIDENCE THAT SUPERIOR BANK VIOLATED THE EQUAL CREDIT OPPORTUNITY ACT AND CONDUCTED UNFAIR PRACTICES.

A dismissal ought not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v Gibson*, 355 U.S. 41, 46 (1957). Dismissal with prejudice is a harsh sanction to be resorted to only in extreme cases and is within the court's sound discretion; court must give full regard for severity of the sanction, granting dismissal sparingly and only when less drastic alternatives have been explored. *Jones v. Smith*, 99 F.R.D. 4 (1983). Courts may not dismiss complaint for insufficiency unless it clearly appears that by no stretch of the imagination is plaintiff entitled to any relief for claims asserted in his complaint. *Kozlowski v. Ferrarra*, 117 F.Supp. 650 (1954). The Petitioner must be given the opportunity to present his case before the jury – no jury has had the opportunity to weigh the evidence of his allegations since the District Court entered judgment as a matter of law prior to the case be deliberated by the jury. The

Petitioner's claims are salient since the impact of fair credit reporting and mortgage processing are inter-related and are vital to the economy. If the financial institutions unilaterally control the terms of the financing and use discriminatory measures to evaluate the applications, then the negative impact on the economy and commerce will be unpredictably harsh.

A. The lower courts denied the Petitioner's constitutional due process rights.

A complaint is not subject to dismissal unless it appears to certainty that a plaintiff cannot possibly be entitled to relief under any set of facts which could be proved in support of its allegations. *Pointer v. American Oil Co.*, 295 F.Supp.573 (1968).

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); *Chauffeurs, Teamsters and Helpers v. Terry*, 110 S.Ct. 1339, 1344-45 (1990). So vital is this great constitutional right that "it is only in exceptional cases and for specific causes that a party may be deprived of it. *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872); *Jacob v. New York City*, 315 U.S. 752, 752-753 (1942). The right of jury trial in civil cases at common law is a ...right so fundamental and sacred to the citizens that it should be jealously guarded by the courts". *Id.* The jury trial is not merely a procedural device, but, a fundamental right and an essential element of self government which the drafters of the Bill of Rights sought to preserve. To safeguard that right from judicial usurpation, the Seventh Amendment prohibits federal

courts from taking away the role of the jury. Under the United States Supreme Court's precedents as to whether there is a statutory or constitutional right to a jury trial on a civil claim under a federal statute, before the court inquiries into the applicability of the federal constitution's Seventh Amendment, the court must first ascertain whether a construction of the statute if fairly possible by which the constitutional question may be avoided; if there is no statute then it is a constitutional question. *City of Monterey v. DelMonte Dunes*, 526 U.S. 687, 119 S.Ct. 1624 (1999). Consistent with the textual mandate of the federal constitution's Seventh Amendment that the right to a jury trial be preserved in suits "at common law," the United States Supreme Court, in interpreting the Seventh Amendment, (1) asks whether the court is dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was; and (2) if the action in question belongs in the law category, then asks whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791. *Id*; *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376, 134 L.Ed. 2d 577, 116 S.Ct. 1384 (1995). The Petitioner's case must fall to the jury in order to preserve his substantive right of the opportunity to be heard. Furthermore, the jury should have been given the opportunity to review the issues of whether the Respondent conducted a discriminatory and unfair mortgage processing in the Petitioner's case. Reasonable minds could differ on whether the Petitioner was qualified for the loan. However, there was sufficient evidence to generate a jury question on whether he was "qualified" to refinance his loan. There was no legitimate business reasons for the Respondent's actions, but, at minimum, it was a question for the jury.

Moreover, the Due Process Clause of the

Fourteenth Amendment requires that a state prior to taking an action affecting an interest in property, provide notice that is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of that action. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 195, 103 S.Ct. 2706, 2709, 77 L.Ed.2d 180 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950); Supreme Court's Construction of Due Process: 77 L.Ed.2d. 1485 (1999). In *Mullane*, the Supreme Court stated that the fundamental right protected by the due process clause is the right to adequate notice and an opportunity to be heard before any state action depriving one of life, liberty or property is accorded finality. The courts failed to protect the Petitioner's property – his credit which impacted his mortgage financing opportunities from being wrongfully taken from him. The Petitioner provided a prima facie case of mortgage discrimination.

The fundamental requisite of due process is the opportunity to be heard. Applying the fundamental principles of due process, it is readily apparent that the lower courts misapplied those basic constitutional concepts – the Petitioner was not given a reasonable opportunity to present his case from an arbitrary or unjust appropriation. Instead judgment was entered as a matter of law during a jury trial so that the salient issues could not deliberated by the jury. By not reporting the Petitioner's good payment history to support his credentials to obtain a mortgage, the Respondent unjustifiably kept the Petitioner at an inflated and burdensome interest rate. If the lower courts' decisions are affirmed, then there would be a disparate impact on African Americans. More importantly, the Petitioner's claims not only affected him but hundreds of thousands of people in the United

States whose terms of mortgages depends upon non-discriminatory lending practices and the accuracy of credit reports.

B. The Respondent must be held liable for its discriminatory lending practices.

Discrimination exists "in forms as myriad as the creative perverseness of human beings can provide. *McCorstin v. United States Steel Corp.*, 621 F.2d 749, 753-54 (5th Cir. 1980). The Petitioner's case should have never been disposed of during a trial, prior to being submitted to the jury. Determinations of motive and intent, particularly in discrimination cases are questions better suited for the jury. *Petitti v. New England Telephone and Telegraph Co.*, 909 F.2d 28, 34 (1st Cir. 1990). The Petitioner met his burden to establish a prima facie case of a violation of the Equal Credit Opportunity Act (the "Act"). 15 USCA Section 1691, et. seq. The Respondent's explanation for not reporting the Petitioner's payment history was a pretext to justify its discriminatory actions.

It is clear from the facts stated above, that the Petitioner's constitutional rights were violated since he was not given the opportunity to present his case before a trier of fact. But for the Petitioner being an Afro-American and conducting unfair lending practices, the Respondent would not have denied the Petitioner a lower interest rate. The Petitioner's application was clear that the purpose of refinancing his mortgage was to lower the interest rate and decrease his monthly payments. Due to his history with the Respondent of making each payment, obviously the Petitioner was qualified to pay for a lower payment. But based on false information in his credit that the Petitioner proved was wrong, the Respondent only offered a higher rate. The Petitioner hired an expert to testify at trial that the

Respondent's unfair acts constituted predatory lending which would yield higher profits for the Respondent. The lower courts erroneously stated that the Petitioner failed to present his case as a matter of law and could not present his overwhelming evidence of the Respondent's unfair and discriminatory practices.

The Petitioner presented evidence that despite being qualified, he, as a member of a protected class, was denied credit. He provided substantial evidence that the Lender violated the Act. In order to establish a prima facie case of a violation of the Act, the Petitioner would need to offer evidence indicating that he: (1) belongs to a protected class; (2) applied for credit for which he was qualified; and (3) rejected despite his qualifications. *Faulkner v. Glickman*, 172 F.Supp.2d 732, 727 (2001). The Petitioner demonstrated that he was a member of a protected class (African American) and that his 1999 telephonic applications to refinance his mortgage were rejected. The Respondent argued that the Petitioner failed to establish that he was qualified based on his credit reports. However, the discrepancy in his credit report (a child support judgment) was proven to be incorrect. Moreover, the Petitioner already had an impeccable two year history with the Respondent with no missed payments. The purpose of the refinancing was to reduce the interest rate which would have resulted in a lower monthly mortgage payment. Without justification, the Respondent denied the Petitioner's application and instead offered a mortgage with a higher rate of interest. The Respondent's conduct was discriminatory and unfair and in violation of the Act. The Petitioner's allegation that the Respondent violated the Act should have been submitted to a jury.

The Respondent rejected the Petitioner's application based solely on his credit report. If the

Respondent's reliance on the credit report was flawed, then there was no justification for rejecting his application – that is, the Petitioner was qualified. The Respondent's predecessor's reliance was clearly flawed since it had the information showing that the credit reports were erroneous. In fact, the Respondent's predecessor helped distort the Petitioner's credit reports by not reporting that he had been faithful in meeting his obligations under his mortgage, and thus was a good credit risk. Ignoring the information it had regarding the Petitioner and using the distorted credit reports. The Respondent was able to keep the Petitioner chained to a costly interest rate.

Consumer protection is a traditional and important component of the police power of the states. *Griffith v. Connecticut*, 218 U.S. 563, 568-69 (1910); *California v. ARC American Corp.*, 490 U.S. 93, 101 (1989). Typical areas of state consumer credit regulation include requirements of truthful advertising, restrictions or prohibitions on automatic wage assignments or authorizations to confess judgment, limitations on security interests and restrictions on debt collection charges and practices; *Aldens, Inc. v. Miller*, 610 F.2d 538 (8th Cir. 1979), *cert. denied*, 446 U.S. 919 (1980). The Truth-in-Lending Act, 15 USC Section 1601, et. seq. is enforced strictly against creditors and construed liberally in favor of the consumer. *Fairley v. Turan-Foley Imports, Inc.*, 65 F.3d 475, 477 (5th Cir. 1995). Any creditor who fails to comply with any requirement imposed under TILA with respect to any person is liable to such person in an amount equal to the sum of (1) any actual damage sustained by such person as a result of the failure; (2) statutory penalties; (3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission. *Dillard Dep't*

Stores, Inc. v. Owens, 951 S.W.2d 915 (1997). Congress designed TILA to aid the unsophisticated consumer so that he would not be easily misled as to the total costs of financing so that there is a balance of scales sought to be weighed between lenders and borrowers. *Thomka v. A.Z. Chevrolet, Inc.*, 619 F.2d 246, 248 (3rd Cir. 1980); *Bizier v. Globe Financial Services, Inc.*, 654 F.2d 1, 3 (1st Cir. 1981). Thus, TILA ensures a meaningful disclosure of credit terms to enable consumers to compare readily the various credit terms available in the marketplace. *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142, 1144 (11th Cir. 1994).

The Respondent violated the provisions of TILA by advertising and offering lower interest rates to the Petitioner but then denied him the credit based upon known false statements. "Because credit has become a way of life for consumers, and their need for protection in that area is great, the most important protective efforts in the field of consumer protection in recent years relate to consumer credit protection." 17 Am.Jur.2d, Consumer and Borrower Protection Section 1 (1990). The Petitioner established a prima facie case of discrimination and that the Respondent failed to present a legitimate, nondiscriminatory reason for the denial of the Petitioner's credit.

Furthermore, the lower courts placed an unreasonable and unconstitutional burden of proof upon the Petitioner. The District Court stated that the Petitioner was required to prove the Respondent's intent and intentional discrimination. However, the burden was in direct conflict with the Supreme Court case *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973) and *Faulkner, supra*, which lessens the burden to the "disparate treatment approach". If the lower courts applied the correct burden of proof, the Petitioner provided sufficient

evidence to overcome a judgment as a matter of law and to have the facts debated by the jury.

The Petitioner, on his own behalf and on behalf of society, is requesting that this Honorable Court review the lower courts' decisions. Financial institutions should be forbidden to use discriminatory practices to deny credit. States must enforce, regulate and protect their residents' property (i.e. credit). The Respondent advertised and offered a lower interest rate mortgage to the Petitioner, an African American, and then denied him credit that he was qualified for.

CONCLUSION

The United States Court of Appeals Fourth Circuit and the United States District Court in Maryland erred in failing to protect the Petitioner's due process rights. By allowing financial institutions to deny credit based upon discriminatory practices violates the constitution and the Equal Credit Opportunity Act.

The Court should grant *certiorari* to review this important matter and order that the Petitioner has a constitutional right to pursue his allegations before a trier of fact.

Respectfully submitted,

Marina Tramontozzi
c/o Curry & Taylor
1330 New Hampshire Ave
Suite 124
Washington, DC 20036
(202) 393-4141

(Any footnotes trail the end of each document.)
No. 02-1923

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILLIAM K. AVERY,
Plaintiff - Appellant,

v.

SUPERIOR BANK, FSB,
Defendant - Appellee.

December 19, 2002, Submitted
December 30, 2002, Decided

COUNSEL: William K. Avery, Appellant Pro se.

Alison E. Goldenberg, GORDON, FEINBLATT, ROTHMAN, HOFFBERGER & HOLLANDER, Baltimore, Maryland; Ava Elaine Lias-Booker, David Eugene Ralph, SAUL EWING, L.L.P., Baltimore, Maryland; Hugo A. Zia, FEDERAL DEPOSIT INSURANCE CORPORATION, Washington, D.C., for Appellee.

JUDGES: Before WILKINS and KING, Circuit Judges, and HAMILTON, Senior Circuit Judge.

OPINION: PER CURIAM:

William K. Avery filed a complaint alleging race discrimination in violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691 (2000), and related state law claims. The case was tried before a jury and the district court entered judgment as a matter of law in favor of the Defendant as to all counts. Avery appeals.

We have reviewed the record and the district court's statements from the bench. The court properly found that Avery failed to establish a prima facie case of discrimination and that, in any event, the Defendant presented legitimate, nondiscriminatory reasons for the denial of credit. Accordingly, we affirm. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

CIVIL NO. AW-00-3785

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

WILLIAM K. AVERY,
Plaintiff,

v.

SUPERIOR BANK, FSB
Defendant.

ORDER OF JUDGMENT

This action came before the Court for a jury trial, the Honorable Alexander Williams, Jr., United States District Judge presiding. The plaintiff's case having been tried and upon motion of the defendant for Judgment as a Matter of Law made at the conclusion of plaintiff's case-in-chief, the Court having GRANTED said motion; the Court having made an oral finding of fact and conclusion of law; and the Court having rendered a verdict in favor of \the defendant Superior Bank, FSB, against the plaintiff William K. Avery for the reasons stated in open Court;

IT IS this 9th day of JULY, 2002, ORDERED and ADJUDGED:

1. That Judgment is entered in favor of the defendant, against the plaintiff;

2. That any and all prior rulings made by this court disposing of any claims against any parties are incorporated by reference

herein and this order shall be deemed to be a final judgment within the meaning of Fed. R. Civ. P. 58; and

3. That the clerk is directed to CLOSE this case.

ALEXANDER WILLIAMS, JR.
United States District Judge

No. 02-1923

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILLIAM K. AVERY,
Plaintiff - Appellant,

v.

SUPERIOR BANK, FSB,
Defendant - Appellee.

2/25/03

ORDER DENYING REHEARING

Petition filed by Appellant William K. Avery for rehearing is denied